82-860

No. .....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MATTHEW MADONNA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was petitioner denied due process when the government knowingly utilized the perjured testimony of a crucial witness at trial?

2. Was petitioner entitled to an evidentiary hearing where he specifically delineated an irrefutable factual basis for his claim of intentional governmental use of perjured testimony and the files and records of the case corroborated petitioner's allegations?

3. Was petitioner denied due process where the government failed to disclose the prior sworn testimony of its key witness which contained evidence clearly favorable to petitioner despite a timely request for such disclosure?

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OCTOBER TERM, 1982

MATTHEW MADONNA,

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Petitioner, Matthew Madonna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 23, 1982.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and appears as Appendix A to this petition. The Court of Appeals affirmed the judgment of the United States District Court, Southern District of New York (Carter, J.), which denied, without a hearing, the petition, pursuant to 28 U.S.C. §2255, to vacate the judgment of conviction entered in the United States District Court for the Southern District of New York on December 21, 1976. The District Court's opinion appears in Appendix B.

Matthew Madonna was convicted, following jury trial before the Honorable Robert L. Carter, of one count of conspiring to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 952(a) and of one count of a substantive offense under 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A). He was sentenced to a maximum term of fifteen years' imprisonment on each count, the terms to run consecutively, fined $25,000 on each count, and placed on special parole for a period of three years to commence upon the expiration of confinement. The judgment of conviction was appealed to the United States Court of Appeals for the Second Circuit, which affirmed the conviction on April 4, 1977. *United States* v. *Madonna*, 556 F.2d 562 (2d Cir. 1977). The Supreme Court of the United States denied certiorari on November 14, 1977. 434 U.S. 919 (1977).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within 60 days of the denial by the Court of Appeals of petitioner's appeal to that Court.

Constitutional Provisions Involved

U.S. Const. amend. 14. This provision appears as Appendix C to this petition.

Statutory Provisions Involved

18 U.S.C. §3500, 28 U.S.C. §2255, Rule 33 of the F.R. Crim.P., Rule 9(a) of the Rules Governing Proceedings in the United States District Courts Under 28 U.S.C. §2255, N.Y.P.L. §70.00. These provisions appear in Appendix D to this petition.

Statement of the Case

The Madonna Trial

Matthew Madonna was charged in a two count indictment. The first count charged him, together with Salvatore Larca, Joseph Boriello, Joseph Florio and Richard Klinger, with a conspiracy to import and distribute heroin. The second count charged Madonna, together with Larca and Boriello, with a substantive narcotics violation. Boriello and Florio pleaded guilty and agreed to testify for the government. Madonna, Larca and Klinger went to trial.

Boriello arranged for the importation of a quantity of heroin and, after his arrest, he informed the agents he was supposed to deliver the car with the heroin to Larca at 58th Street and Fifth Avenue. After arranging to monitor the delivery, the agents permitted Boriello to proceed to the meeting place. The agents observed Boriello arrive in a red Ford and Larca and Madonna emerge from a restaurant to speak to him. At that time Boriello walked to Larca's automobile and Madonna and Larca approached the red Ford. When Madonna and Larca entered the Ford, they were arrested. (Tr. 224-28, 288-89) Despite the confessions of Boriello, Florio, Travers and Portman, none of them in any way implicated Madonna in the transaction.

In view of the absence of any testimony connecting Madonna to the crime, the District Court held him in the case because of circumstantial evidence alone. The Court summed up that evidence as follows:

> The circumstantial evidence, as I see it, is one, renting the car in a name not his own, the red Grenada, that Grenada being utilized by Mr. Boriello for the supposed transport of the heroin; your taking possession of the car at 58th Street and Fifth Avenue and your rental of the car at a time when the evidence

shows that you had also rented another car and therefore had the use of the car for your purposes, and your presence at Mr. Larca's home at the time when Mr. Boriello made his visit on his return from the trip.

Under those circumstances, it is my finding that a prima facie case has been established.

(Tr. 1746-47)

At trial Madonna did not contest the occurrence of the facts recited by the District Court. Rather he contended the actions and, particularly, the use of the assumed name Paul DeRobertis were not part of narcotics activities but were taken as part of a secret relationship Madonna, a married man, had with a woman named Joy in Altamonte Springs, Florida. As a result of this defense, the only issue in the case was Madonna's intent. The District Court, therefore, permitted the testimony of Nicholas Visceglia as to an alleged prior similar act with Madonna.

Before Visceglia took the stand, counsel for Madonna made an application to the District Court concerning the material supplied by the government in accordance with its obligations under 18 U.S.C. §3500 and *Brady* v. *Maryland*. Counsel for Madonna informed the court that part of the material supplied by the government was Visceglia's arrest record which showed his most recent arrest on July 8, 1975, in the federal district court in Newark, New Jersey, in a case entitled *United States* v. *Levy, Verna, Visceglia et ano.** An investigator sent by defense counsel to inspect the contents of the file was told it had been sealed by the Honorable H. Curtis Meanor, United States District Judge. Defense counsel requested the District Court in New York to contact Judge Meanor to produce the file for *in camera* inspection by the Court. The government made no comment

* Hereinafter this case will be referred to as the Verna-Visceglia case.

with respect to this request, and Judge Carter agreed to get in touch with Judge Meanor. (A. 82)

During a break in the proceedings Judge Carter advised counsel he had contacted Judge Meanor. The following colloquy ensued:

> (At the side bar.)
>
> The Court: I told Judge—Judge Meanor and I had a conversation and as a result of that I told him not to bother with the material.*
>
> What it involves is apparently one of the three defendants—and I don't remember, but one of them was participating in the counsel of the defense, with the lawyers and so forth, when he had agreed to be an informant, and apparently the DEA people hadn't advised the prosecution about that, and Judge Meanor had a hearing on the matter outside the prosecution, to determine whether there was prosecutorial misconduct. And it seems to me that has nothing to do with the issues in this case.
>
> Mr. Alch: Your Honor, was Mr. Viseglie involved in that?
>
> The Court: I don't remember which one was involved.
>
> Mr. Brown: Yes, he was, Judge. I can tell you on information and belief, Mr. Byrne [sic] and Mr. Viseglie had the same counsel. There came a time—
>
> • • •
>
> Mr. Alch: If Mr. Viseglie was in any way accused of invading the camp of his co-defendants, that has a direct bearing on his credibility as a witness for the government.

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* Hereinafter this material, which was comprised of an evidentiary hearing pre-dating the *Madonna* trial, will be referred to as the Verna-Visceglia hearing.

The Court: No. You may, of course, bring that out, but the point is that that has nothing to do with the issue here. The issue here was that it was not Viseglie who did the invasion. Apparently the prosecution had not been advised that the man had agreed to be an informant, and he wasn't acting as a spy. It was careless on the part of the Department.

* * *

Mr. Alch: Wouldn't we have a better position to cross examine, having the documents in hand? We can only speculate, your Honor.

The Court: No, I don't think we are going to have that. As I indicated, that hasn't anything to do with this case. You can ask him about that, if you want to.

As a matter of fact, I am not even sure that he was the person who was involved. I think he was one of the defendants.

* * *

Mr. Alch: It bears upon an event which bears on Mr. Viseglie's cooperation with the government—. What if he denies something that those papers prove? We can't contradict him unless we have the documents.

Mr. Flannery: It is collateral, anyhow.

The Court: If he denies it, I will consider it.

All right, let's go.

(A. 101-104)

After this colloquy Visceglia testified at the Madonna trial that he had a series of meetings with Madonna and his co-defendant Larca and with Larca alone over a two-day period in February, 1972, four and a half years before the events relating to the charges in the case on trial. Visceglia testified that a deal was discussed to sell him 10 kilos of heroin, but it fell through when he could not

raise the necessary money. Visceglia's financier in the transaction was Paul Levy, who had been a co-defendant in the Verna-Visceglia case. Madonna was ultimately convicted on both the conspiracy count and the substantive violation and remanded immediately to jail. (Tr. 2096)

The Verna-Visceglia Case in New Jersey

After the *Madonna* trial, access was obtained to the minutes of the Verna-Visceglia hearing in New Jersey. (A. 261-571) After that pre-trial hearing, which had been the subject of the application to Judge Carter by Madonna's counsel, Visceglia's co-defendant, his Uncle Donald Verna, went to trial, was convicted, and appealed the conviction. The Court of Appeals for the Third Circuit reversed Judge Meanor's findings at the hearing, reversed the conviction, and dismissed the indictment due to the government's action in the case. The decision centered around Visceglia's activities as a defendant, represented by the same counsel as his co-defendant uncle, who was cooperating with the government while meeting with his uncle and defense counsel. (A. 263-65)

The minutes of the hearing, which had preceded the *Madonna* trial, revealed Visceglia had testified at that hearing, as had agents of the Drug Enforcement Administration and as Assistant United States Attorney. Contrary to the government's assertion that the material had been collateral, the Verna-Visceglia hearing minutes have proved what the government knew about Visceglia independent of the hearing itself. The minutes establish that the prosecutor knowingly permitted Visceglia to commit perjury at the *Madonna* trial.

The first area of Visceglia's perjury at the trial related to the contradictory portrayal of Paul Levy, who was the

other alleged participant in the Madonna prior similiar act. The government chose to argue in the District Court that there was no contradiction between Visceglia's description of Levy during the period 1971 through 1973 as his financier in a $200,000 narcotics transaction at the *Madonna* trial and, at the Verna-Visceglia hearing, as a "small fish" bookmaker during the same time-frame. These versions are contradictory and go directly to the issue of whether the prior similar act happened at all. At the hearing the D.E.A. agents and Rhonda Fields, the prosecutor in New Jersey, testified they had questioned whether Visceglia's cooperation should be continued. (A. 465-66) The government also knew Visceglia had vacillated as to whether he would testify against Paul Levy despite the fact that he maintained Levy's innocence. (A. 278, A. 283, A. 350, A. 439, A. 443, A. 451, A. 514). In addition, one agent later testified that Visceglia was a liar. Thus, the government was aware of Visceglia's perjurious nature when he took the stand at the Madonna trial.

The second area of Visceglia's perjury involves his testimony to the effect that his cooperation would be made known to the federal sentencing judge and to the state authorities. At the time of his testimony at the *Madonna* trial, Visceglia had already pled guilty to two A-3 narcotics felonies under New York State law and had been sentenced to one term of from zero to three years and to one term of 3 years to life, both sentences to run concurrently. In connection with these sentences, Visceglia testified that his cooperation was to be brought to the attention of the federal sentencing judge and the state authorities. (A. 108-09)

Visceglia's state sentences were the minimum that could have been imposed upon him in 1976 under New York State law, and the minimum was imposed because Visceglia's federal cooperation had already been brought to

the attention of the state sentencing judge.* As Justice Cohen wrote in his order denying Visceglia's motion to reduce his state sentence:

> Further, the sentence imposed resulted from a negotiated plea, and in light of the possible sentence which could have been imposed . . . on either one of the indictments, pled to by this defendant, it is quite clear that the reason for the Court's exercising it's discretion in the imposition of such a lienent [sic] sentence in this case, was the awareness that the defendant was co-operating with Federal and State authorities.

(A. 607-08) This consideration which Visceglia had already received by the time of the *Madonna* trial was not disclosed by Visceglia or the government.

Visceglia was also permitted to remain free on bail courtesy of the federal government and he was allowed to surrender to the Bronx authorities rather than be apprehended on a fugitive warrant. (A. 674) In addition to all this consideration, efforts were being made prior to the *Madonna* trial to reduce the beneficial State sentences after they were imposed. Indeed, a memo dated June 3, 1976, in Visceglia's attorney's file apparently recorded certain discussions which had taken place with Mr. Cooney. The memo states, in relevant part:

> Cooney said that under state law once a prisoner is serving his sentence the judge cannot change the sentence. Perhaps we can argue that Visceglie is serving the one to three year sentence and has not begun to serve the sentence of three years to life. Peter Grishman runs the narcotics unit for the Bronx D.A.'s office. Cooney also said he would write a letter to the Parole Board. Cooney and Shaky O'Neal told me that

* N.Y.P.L. §70.00 (McKinney 1973).

> Visceglie made some cases for the United States Attorney's office in New Jersey and apparently also cooperated with Nadjari.

(A. 765)

When Visceglia testified at the *Madonna* trial, both he and the government knew extraordinary efforts were being made to reduce his state sentences.

However, all of these measures were concealed from the defendant. This concealment was compounded when the prosecutor stated in his summation:

> You have all been told about their deals. *For the most part, all they get for their cooperation is a recommendation, an explanation and the extent of their cooperation, no specific recommendation. These things were mentioned in my opening.* They were brought out for the most part on the direct testimony. They were admitted to by the witnesses themselves on the stand. No witness in this case has been given immunity except for the half brother of one. Consider what they faced as they sit there or sat there on the witness stand. They are facing lengthy jail sentences and all hope—well, some hope not to go to jail. Others hope that their cooperation will be taken into account and that their sentence will be reduced in some way, but none of them know that that will happen.

(Tr. 1770) Emphasis added.

The government failed to respond to petitioner's assertion that there had been joint cooperative efforts with the state authorities after the imposition of the state sentences and before the *Madonna* trial to reduce Visceglia's state sentences. Moreover, the District Court did not address the issue of what consideration had been already received

by Visceglia prior to the *Madonna* trial as distinguished from what consideration he might expect in the future. It was the former which was concealed from the petitioner.

The third area of Visceglia's perjury concerned the period and extent of his cooperation. At the Madonna trial, Visceglia maintained he became an informant and cooperated with law enforcement for the first time after his arrest on July 17, 1975, in connection with the Verna-Visceglia case. Visceglia so testified on both direct and cross examination. (A. 107, A. 128, A. 134, A. 160-61) When he did so, Visceglia and the prosecutor knew that the answers were perjurious.

During the Verna-Visceglia hearing, several agents and the prosecutor who orginally handled the Verna-Visceglia indictment, testified that they knew Visceglia had been an informant in the Bronx. (A. 308, A. 329, A. 376, A. 470, A. 476) Visceglia himself testified at the Verna-Visceglia hearing that he had been an informant for Maurice Nadjari, the New York Special Prosecutor, since 1974. (A. 397) After his conviction, defendant obtained a letter from an Assistant District Attorney which confirmed that Visceglia had been cooperating with the Bronx District Attorney's Office since the Summer of 1973. The Office of the Special Prosecutor also confirmed that Visceglia had been an informant since the Fall of 1974. (A. 672) In the face of this patent conflict, the government concedes it was aware Visceglia had been cooperating with Bronx authorities since 1973, but claims its suppression of the truth resulted from of the operation of Visceglia's mind, that is, how Visceglia understood the question. (A. 653, A. 668-69) This statement is made, of course, without the benefit of any affidavit or testimony on the subject from Visceglia.

In addition, petitioner offered an affidavit of Frederick P. Heilfurth which suggests Visceglia was an informant

for the B.N.D.D., the predecessor agency to the D.E.A. (A. 603-05) Moreover, petitioner has produced two sworn affidavits from former New York City Police Department detectives which state that Visceglia had been a cooperating individual since 1963. (A. 586-87, A. 588-89) The government's response to this allegation is the plainly inadequate statement from the prosecutor that Visceglia has told him it was untrue.

The fourth area of Visceglia's perjury concerned the place of his arrest. On direct examination at the *Madonna* trial, Visceglia testified he was arrested in July, 1975, in Newark, New Jersey, in connection with the Verna-Visceglia indictment. (A. 107) Under cross-examination, he stated he had been arrested on White Plains Road in the Bronx, New York. (A. 157) When Visceglia testified he had been arrested either in Newark, New Jersey, or at home in the Bronx, he and the government knew those answers were false. The Verna-Visceglia hearing establishes that the government knew Visceglia had been arrested in the office of a Bronx Assistant District Attorney by pre-arrangement between the state and federal authorities. (A. 270-71, A. 308)

The government has also conceded the falsity of this fourth area of Visceglia's testimony. The prosecutor ascribes the prejury to confusion on the part of Visceglia, despite the fact that it was the prosecutor's question on direct examination which gave rise to the uncontradicted perjurious answer. There is, of course, no affidavit from Visceglia, and neither his nor the prosecutor's credibility on the subject can be tested without a hearing.

The fifth area of Visceglia's perjury concerned his receipt of money for his services as an informant. At the *Madonna* trial Visceglia was asked on cross-examination:

Are you receiving any benefits from the United States Government in the form of payments to you or your dependents of any money?

(A. 176-77)

Visceglia responded:

No, just for relocation purposes.

(A. 177)

The government in response to the motion below for the first time submitted Visceglia's informant file. It showed Visceglia was an undercover informant for the D.E.A. and that he had received at least one payment of $150 for information. (A. 688) Visceglia therefore lied on yet another fact which was solely within the possession of the government. Once again, the lie went uncorrected. The revelation of the payment of money for information would have provided petitioner with a new argument that Visceglia had a financial interest in testifying against Madonna.

Visceglia's five acts of perjury and the prosecution's failure to correct them were not the total extent of the wrong perpetrated at the trial. The prosecutor also failed to disclose evidence favorable to the defendant and then compounded his misconduct by misrepresenting to the District Court. At the time Visceglia took the stand at the *Madonna* trial, the government knew Visceglia had testified at the Verna-Visceglia hearing. Yet in clear disregard of its obligations under 18 U.S.C. §3500 and *Brady*, the prosecutor never informed the District Court of the existence of that testimony.

Visceglia lied in at least five instances at the *Madonna* trial, concealing, with the knowledge and help of the prosecutor, material which affected his credibility and his motives for testifying and which threw into doubt the prior similar act itself. The prosecutor stood by in silence while this occurred. The government misconduct did not end

there. Mr. Flannery conceded that he and the D.E.A. agents knew in advance of the *Madonna* trial that Visceglia had testified at the Verna-Visceglia hearing. Despite that, the prosecutor remained silent when defense counsel sought access to the sealed hearing minutes, and then actively misled the trial court when it was apparent the court did not understand what the hearing minutes contained.

POINT ONE

The Government's Knowing Use of Perjured Testimony in This Case Requires That the Judgment of Conviction Be Vacated and a New Trial Ordered.

1. *The Government's Knowing Use of Perjured Testimony Requires a New Trial Because There Was a Reasonable Likelihood the False Testimony Could Have Affected the Judgment of the Jury*

An essential protection to the defendant in a criminal case, as provided by the due process clause of the fifth amendment to the United States Constitution, is that a criminal conviction cannot be obtained by the knowing use of false evidence. That is because the requirement of due process:

> . . . is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. . . .

Mooney v. *Holhan*, 294 U.S. 103, 112 (1935).

In this case, the government witness Visceglia testified about a prior similar act with Madonna when the government was aware he had drawn a contradictory picture of his partner in the prior similar act, Paul Levy. Visceglia also testified his cooperation would be brought to the attention of state authorities when he and the government knew he had already received greater consideration than that. Visceglia also testified that he first became an informant in 1975. The government knew that was untrue. Visceglia swore under oath he was arrested at his home in the Bronx, and that, too, was known by the government to be false. Finally, Visceglia lied about receiving payment for information when the government was the payor. Nevertheless, the government failed to correct Visceglia's testimony. Madonna was, accordingly, denied due process of law.

In *Napue* v. *People of the State of Illinois,* 360 U.S. 264 (1959), the Supreme Court established certain vital principles applicable to cases where it is claimed the prosecutor knowingly used false testimony to obtain a conviction. First, it was estabilshed that such a conviction must fall whether the state solicits the false evidence or merely allows it to go uncorrected. Secondly, the rule that such a conviction is tainted applies even if the false testimony goes only to the credibility of the witness. Thirdly, a conviction must be reversed if there was any reasonable likelihood that the false testimony affected the fairness of the trial. *Giglio* v. *Urited States,* 405 U.S. 150 (1972).

These cases establish the essential principles under due process which warrant reversal of a conviction. First, the government must have solicited false testimony or allowed it to go uncorrected. The government elicited Visceglia's false testimony in five instances.

The second element which must be established is that the prosecutor knew or should have known of the false testimony of his witness. *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). Here the documents submitted by the petitioner and the government in the District Court clearly establish such knowledge.

Finally, the evidence must be material. Focusing on the materiality of the false evidence presented, the Supreme Court, in *United States* v. *Agurs*, 427 U.S. 97 (1976), held that a new trial is constitutionally required where the government knew or should have known it had presented perjured testimony at trial if there is *any* reasonable likelihood the false testimony could have affected the judgment of the jury. 427 U.S. at 103. In the case at bar, Visceglia's perjury was clearly material under the *Agurs* standard.

2. *A New Trial Is Required Because There Was a Reasonable Likelihood the Jury Was Affected by Visceglia's Perjured Testimony*

As part of the government's attempt to divert the District Court from the actual issues raised in this motion, the government argued that under the standards applicable in a case where there is merely newly discovered evidence and no alleged government misconduct, *United States* v. *Alessi*, 638 F.2d 466, 479 (2d Cir. 1980), or where there is negligent but inadvertent nondisclosure, *United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 427 U.S. 819 (1976); *United States* v. *Rosner*, 516 F.2d 269, 274-75 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976), Madonna would not be entitled to a new trial. However, those are not the standards applicable here.

There are two categories of cases where courts deviate from the proscribed "probability" test and permit new

trials based on a less exacting demonstration of the new evidence's materiality to the defendant's conviction. One line of cases turns upon the witnesses' commission of perjury with the government's knowledge; the other line of cases looks to the existence of prosecutorial culpability in suppressing or failing to disclose the evidence in question. *See United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 427 U.S. 819 (1976). In those cases, the government's actual knowledge of the falsity of the witness' testimony and the concomitant intentional government suppression of that knowledge and therefore of evidence useful to the defendant at trial "will mandate a virtual automatic reversal of a criminal conviction." 527 F.2d at 243 citing *Moore* v. *Illinois*, 408 U.S. 786, 797-98, 92 S.Ct. 25621, 33 L.Ed.2d 706 (1972); *Giglio* v *United States*, 405 U.S. 150, 154, 92 S.Ct. 763 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). This is clearly such a case.

Here there was uncorrected, knowing perjury and suppression of the specifically requested Verna-Visceglia transcript. Even if it were Visceglia's credibility alone, that would be sufficient in this case to warrant a new trial. *Napue* v. *Illinois*, 360 U.S. 264 (1959).

The purposeful government concealment distinguishes this case from that of *United States* v. *James*, 609 F.2d 36 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). The differences between the situation in *James* and the case at bar are significant. In *James*, the government properly disclosed the existence of the prior testimony. In *Madonna*, the prosecutor did not. In *James*, the government sought to obtain the testimony. In *Madonna*, the prosecutor did not. In *James*, the judge would not release the transcript. In *Madonna*, Judge Meanor would have released it but Judge Carter was uncertain, due to the prosecutor's si-

lence, as to its possible relevance and did not, therefore, require its release. In *James*, the prosecutor's representation that the material was irrelevant was based on a representation made to him by another prosecutor with actual knowledge of the testimony. In *Madonna*, Mr. Flannery has stated he did not know what was in the hearing, but he represented it was collateral anyway. In *James*, accordingly, the failure to make disclosure of the testimony was unavoidable. In *Madonna*, it could have been avoided if the government had acted in a proper fashion.

These acts of prosecutorial misconduct make the standard applied to the testimony in *James* inapplicable. Instead, here the less stringent standard set forth in *United States* v. *Agurs*, 427 U.S. 97 (1976), is appropriate. A new trial is required if there is *any* reasonable likelihood the concealed evidence could have affected the judgment of the jury. The government, by calling Visceglia's testimony "critical" to Madonna's conviction, thereby established such a reasonable likelihood here, and a new trial should be ordered.

POINT TWO

The Facts Established Herein Do Not Justify the Conclusion That Appellant Is Entitled to No Relief and Therefore an Evidentiary Hearing is Warranted.

A Hearing Is Required to Fully Develop the Underlying Facts

Madonna alleged five specific instances where Nicholas Visceglia, a critical witness, committed perjury. The Assistant United States Attorney has conceded the government's knowledge of the falsity of some of its witness' responses. To avoid the consequences of its acknowledgment, the government has attempted to minimize the meaning of the false statements and has wholly failed to address

other of the allegations which have been made. Under these circumstances, Madonna is entitled to a hearing and the opportunity to establish that there was a reasonable likelihood the fairness of his trial was affected by the government's knowing use of Visceglia's perjured testimony. *See, e.g., Perkins* v. *Lel'evre,* 642 F.2d 37 (2d Cir. 1981), *aff'd,* after remand, slip op. 2d Cir. 10/21/82.

Unless the motions, files and records of the case conclusively show Madonna is entitled to no relief, he must be given a hearing. The determination as to whether to hold a hearing involves a twofold analysis: 1. whether the petitioner's allegations specifically delineate the factual basis of his claim, and 2. even where the allegations are specific, whether the records, files and affidavits are conclusive against the petitioner. *United States* v. *Taylor,* 648 F.2d 565 (9th Cir. 1981).

Visceglia perjured himself when he testified at Madonna's trial about the prior similar act with Madonna. At the *Madonna* trial Visceglia described Paul Levy as his financier in the prior similar act who apparently had connections at certain Harlem bars where he could expect to raise $200,000 on short notice. This description conflicts with Visceglia's portrayal of Levy as a small fish numbers guy during the Verna-Visceglia case. The antithetical positions on Levy become clear when one realizes that the time period of the prior similar act was within the conspiracy period of the Verna-Visceglia case. The transcript of the Verna-Visceglia hearing supports all of appellant's contentions concerning Levy's status; Visceglia's use of his potential as a witness against Levy if it served his ends, despite his earlier assertion of Levy's innocence, Visceglia's perjury concerning his place of arrest and Visceglia's perjury concerning the date of his first cooperation with the various state authorities. This latter fact is also

supported by correspondence from the Bronx District Attorney's Office and the Special Prosecutor's office. Indeed, proof in the form of affidavits from a retired New Jersey State detective by the name of Heilfurth and two former New York City detectives suggest that Visceglia cooperated as early as 1963.

Madonna's contentions about perjury concerning the consideration he had already received and the unusual steps being contemplated and taken to further reduce his sentence are irrefutably established by Judge Cohen's order, John Gross's memo and the Gross affidavit submitted for reimbursement. In addition, the special consideration Visceglia had already received in the form of government-sponsored adjournments and the notice he received of his fugitive status were supported by Agent Taylor's letter, Judge Cohen's order and the Verna-Visceglia minutes.

Finally, Visceglia lied when he testified at the *Madonna* trial that he had only received money from the government for relocation purposes. Visceglia's informant file, supplied by the government in its answering papers to this motion, establishes Visceglia, in fact, received a payment on March 1, 1976, of $150.00 for information.

Thus Madonna has set forth specific question and perjured answers. He also set forth the true answers to those questions, and he attached other sworn testimony, court records, affidavits, letters and memoranda which document the untruth of all of the contested answers. He has therefore clearly and specifically provided factual support for his claims. Accordingly, Madonna is entitled to a hearing unless the files and records of the case conclusively show that he is entitled to no relief. The files do not.

The government's answer to the motion to vacate the sentence includes affidavits from the Assistant United

States Attorney who prosecuted the *Madonna* case, John P. Flannery, II, Assistant District Attorney Peter Grishman, D.E.A. Agent John J. O'Neill, Stephen Harwood, Rhonda Fields and Vincent A. DeFillippis. Conspicuously absent from the response is a statement from the witness himself, Nicholas Visceglia. Nor does it contain any affidavit from John P. Cooney, the former head of the Narcotics Division of the Southern District, who was the prosecutor who recommended Visceglia to the Bronx District Attorney for his cooperation and who called him a "critical" factor in the conviction of Madonna. Cooney was also the government prosecutor who sought to reduce Visceglia's state sentences prior to the *Madonna* trial.

The government's answer concedes its knowledge of the falsity of Visceglia's *Madonna* trial testimony on the issues of the length and extent of Visceglia's cooperation and the place of his arrest. The government argues that the inferences drawn from the responses are mistaken or that Visceglia's answers were merely inadvertent and not perjurious. On the issue of the consideration Visceglia had received which was concealed from the defendant, the government is silent. The government instead contends Visceglia testified truthfully about what consideration he could expect in the future. On the contradictions about Paul Levy which implicate the prior similar act itself, the government does not even deny its knowledge of these inconsistencies, but argues that in its view, they are not really inconsistent. There has been no government response on the direct contradiction between Visceglia's *Madonna* trial testimony that he had been paid only for relocation and his informant file which establishes he had been paid for information.

The District Court, in denying the motion, repeatedly credited the government's arguments and discredited the

ones made by Madonna. As such it was erroneously treating the affidavits submitted by the government as part of the "files and records of the case." The Supreme Court observed in a similar case:

> It is true that they [appellant's allegations] are denied in the [government] affidavit filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way.

Walker v. *Johnston*, 311 U.S. 275, 286-87 (1941). Thus, where the government has even denied Madonna's allegations, the effect of those denials merely establishes the need for a hearing. The denials do not have the evidentiary effect of actually determining a disputed issue. However, here, the government has not so much flatly denied the allegations as ignored them or argued they were mistaken or misunderstood. Even if the government can rebut the inferences Madonna seeks to have drawn from conflicting court testimony and records or establish that some answers were misunderstood or wrong but not perjured, Madonna need not disprove all such possibilities to be entitled to a hearing. *Lindhorst* v. *United States*, 585 F.2d 361 (8th Cir. 1978).

In *Reagor* v. *United States*, 488 F.2d 516 (5th Cir. 1973), the Circuit Court held it was error for the district court to deny Reagor's motion without an evidentiary hearing where he argued that under *Giglio* v. *United States*, 405 U.S. 150 (1972), he would be entitled to a new trial if, in fact, the co-conspirator-turned-government witness did not accurately apprise the jury that the prosecution had made promises to him in return for his testimony. 488 F.2d at 517. In the case at bar, Madonna has done much more than in *Reagor*, because he has shown the actual

falsity of Visceglia's testimony, and the government has even conceded Visceglia's testimony was contrary to the truth and that the contradictions were known to the government.

A second aspect of the analysis that engaged the *Reagor* court was whether the witness' testimony was material to Reagor's conviction. The court in *Reagor* held that the testimony was "highly instrumental" in Reagor's conviction because without the witness, the government's case would have been based entirely on a web of circumstantial evidence and the fact that the heroin was found in the car in which the defendants were apprehended. 488 F.2d at 516. The parallel of the *Madonna* case to *Reagor* on this issue of materiality is a close one.

At the *Madonna* trial, the District Court had found the evidence against Madonna to be totally circumstantial. Indeed, as to those acts which the District Court recited as comprising the circumstantial evidence, Madonna had conceded he engaged in that specific conduct. Madonna's defense at trial had been solely directed to the intent with which he had performed those otherwise equivocal acts. Thus, Madonna presented testimony which sought to explain his actions in the context of an affair he, a married man, was having with another woman. Because the District Court agreed Madonna had put his intent in issue, it allowed Nicholas Visceglia to testify to a prior similar act with Madonna and his co-defendant Salvatore Larca. The importance of that testimony is apparent as it was the only direct evidence which connected Madonna to any heroin transaction.

However, Visceglia's testimony did something more than provide the only missing element, intent. Visceglia described a relationship between Salvatore Larca and Madonna which could not be gleaned from any other evidence in the case. In the 1972 transaction, Madonna was the boss

and Larca the underling. This created a pattern which the prosecutor used in summation to draw an analogy to the transaction charged in the case. The prosecutor argued:

> You can judge the relationship of Mr. Larca and Mr. Madonna in the February 1972 incident. Mr. Larca was the person who at that time was taking the risk for Mr. Madonna. He was the one who went out and made each of those five visits, waiting for the money to come in, and it was only Matthew Madonna who was there on the last spot when the money was going to be delivered, when the deal was through, to complain, 'What's wrong with you?'—because the heroin was moving through the streets, and the working relationship between these two men is something that you should consider.

(Tr. 1807-08). Such argument about Madonna's relationship to his co-defendant Larca would not have been possible without Visceglia.

Indeed, the government, in a letter dated March 22, 1977, from John P. Cooney to the District Attorney of Bronx County, described Visceglia's testimony as "critical in putting the lie to Madonna's well-orchestrated defense and resulted in his conviction." It is appropriate to consider such statements by the government when assessing the materiality of the witness' testimony to a conviction. *Teague* v. *United States*, 499 F.2d 1381 (7th Cir. 1974).

Visceglia's repeated perjury, together with the other matters, would have entitled the jury to discount his entire testimony. The case against Madonna would then have been solely circumstantial and Madonna's version of the events could have been given greater credence by a jury. *See Taylor* v. *Lombard*, 606 F.2d 371, 375 (2d Cir. 1979). Accordingly, Madonna is entitled to an evidentiary hearing.

POINT THREE

The Government's Failure to Disclose the Prior Sworn Testimony of Its Witness and the Existence of Evidence Favorable to the Petitioner and Detrimental to the Government's Key Witness Against Petitioner Requires a Reversal of the Conviction.

18 U.S.C. §3500 provides that a statement of a government witness in the possession of the United States shall be produced if it relates to the subject matter as to which the witness has testified. In addition, when a defendant has requested the prosecutor to produce specific information which is material to the case against him, due process requires that such production be made. *Brady* v. *Maryland,* 373 U.S. 83 (1963). *See United States* v. *Agurs,* 427 U.S. 97 (1976). In the case at bar, the Verna-Visceglia hearing contained both prior sworn testimony by Visceglia and other testimony by D.E.A. agents and an Assistant United States Attorney which had been requested by defense counsel, but which the prosecutor suppressed. That suppression requires the reversal of this conviction.

The government is constitutionally obligated to disclose evidence which serves solely to impeach a prosecution witness if the reliability of the witness may be determinative of guilt or innocence. *Giglio* v. *United States,* 405 U.S. 150 (1972). The evidence contained in the Verna-Visceglia hearing, including Visceglia's own prior sworn testimony, is favorable evidence within the meaning of *Giglio.* The Verna-Visceglia hearing and Visceglia's testimony provided the government with information which directly contradicts Visceglia's trial testimony and provides factual support for the defense contention that Visceglia had a motive to provide testimony against Madonna without regard for its veracity. Had the government prosecutor not misled the

Court by its silence and false comment that the material was collateral, Madonna could have impeached Visceglia with his own prior testimony and could have presented the jury with government agents whose testimony would have contradicted Visceglia's testimony. *See e.g., United States* v. *Zborowski,* 271 F.2d 661 (2d Cir. 1959).

The suppressed Verna-Visceglia hearing material established Visceglia's true assessment of Levy, his willingness to testify against Levy to avoid a remand where he otherwise said Levy was innocent, the D.E.A. agent's assessment of Visceglia's credibility, and the specific instances of perjury at the *Madonna* trial. Thus, as evidence impeaching the testimony of Visceglia, the hearing minutes must be classified as favorable to the petitioner.

This evidence, which would have permitted substantial impeachment of Visceglia's credibility, was material under the circumstances of this case. In *United States* v. *Agurs,* 427 U.S. 97 (1976), the test of materiality, where, as here, the evidence has been specifically requested by the defense, is that a new trial is required if its disclosure might have affected the outcome of the trial. *Agurs, supra,* at 104.

Evidence of Visceglia's perjury and contradictory testimony, as compared with the testimony of government agents, might have affected the outcome of this case. Visceglia's credibility was an important issue at trial, which otherwise involved only circumstantial evidence which Madonna explained through his defense. Visceglia was the only witness who provided unambiguous inculpatory evidence. Indeed, the government, described Visceglia's testimony as "critical." The evidence vitiating the prior similar act, establishing Visceglia's motives, impeaching Visceglia's credibility and providing negative character evidence, which was not disclosed, was, therefore, liable to affect the jury.

In sum, by failing to disclose evidence of Visceglia's own testimony and that of government agents and an Assistant United States Attorney which was demonstrably inconsistent with his testimony at trial, the government failed to afford the defense the tools to allow for an accurate evaluation of Visceglia. Where, as here, that witness was critical to the jury's determination of guilt, the non-disclosure denied Madonna due process of law and mandates a new trial.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

NEWMAN & ADLER
Attorneys for Petitioner

GUSTAVE H. NEWMAN
DEBORAH A. SCHWARTZ
Of Counsel

APPENDIX A

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Order 82-2132—Filed September 23, 1982

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of September, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. J. EDWARD LUMBARD, *Circuit Judge*
HON. WALTER R. MANSFIELD, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*

MATTHEW MADONNA,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Matthew Madonna appeals from an Order of the United States District Court for the Southern District of New York (Carter, J.), entered on April 13, 1982, which denied without a hearing his petition to vacate a judgment of conviction entered in the United States District Court for

the Southern District of New York on December 21, 1976, and his request for a new trial.

Regardless of whether appellant's application is treated as a motion under Fed. R. Civ. P. 33 or a petition under 28 U.S.C. § 2255, it was properly denied by the district court. We affirm substantially for the reasons set forth in Judge Carter's April 12, 1982 opinion.

Because Judge Carter correctly found that appellant's application was frivolous and appellant's supporting papers created no substantial issues or detailed and controverted issues of fact, Judge Carter did not err in failing to hold an evidentiary hearing. *Newfield* v. *United States*, 565 F.2d 203, 208 (2d Cir. 1977).

Affirmed.

/s/ Hon. J. Edward Lumbard
Hon. J. Edward Lumbard

/s/ Hon. Walter R. Mansfield
Hon. Walter R. Mansfield

/s/ Hon. Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland
Circuit Judges

***N.B.** Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

APPENDIX B

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Opinion No. 53011

76 Cr. 846 (RLC)

81 Civ. 7269 (RLC)

UNITED STATES OF AMERICA,

—against—

MATTHEW MADONNA,

Defendant.

Appearances

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CARTER, *District Judge*

Appendix B—Opinion of the United States District Court

OPINION

I

In a motion filed on November 20, 1981, pursuant to 28 U.S.C. § 2255 and fully submitted as of March 5, 1982, defendant Matthew Madonna moves to vacate and set aside his conviction and sentence.

Madonna was tried and convicted on a two-count indictment charging a conspiracy to import heroin into the country and possession of heroin with the intent to distribute the drug. His trial, with two codefendants, began on November 1, 1976, and ended on November 16, 1976, when the jury found the defendant guilty on both counts. Madonna was subsequently sentenced to 15 years imprisonment on each count to run consecutively and a $30,000 fine. On April 4, 1977, his conviction on appeal was affirmed from the bench in an oral opinion and summary order. 556 F.2d 562. The disposition of an appeal in summary fashion means that the Second Circuit considered the issues raised to be so insubstantial that no jurisprudential purpose would be served by a written opinion, and such determinations are not citable as precedents pursuant to § 0.23 of the Local Rules of the Second Circuit. Rehearing was denied on May 27, 1977, and the United States Supreme Court refused review on October 31, 1977. 434 U.S. 919.

On February 27, 1978, defendant filed a Rule 35, F.R. Crim.P., motion to set aside or modify the sentence on the ground that it was illegal and that the court had relied on inaccurate considerations not based on the record. That motion was denied by this court on March 22, 1978, and the claims were rejected by the Court of Appeals on September 29, 1978, this time in a written opinion. 582 F.2d 704. The Supreme Court denied certiorari on January 8, 1979. 439 U.S. 1069.

Appendix B—Opinion of the United States District Court

The gravamen of the instant motion, is (1) that the government allowed a witness, Nicholas Visceglie, who testified on a collateral matter, to give false testimony; (2) that in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government suppressed or failed to reveal the substance of what transpired at a hearing involving Visceglie's relations with a codefendant and with the government in a case pending in the United States District Court for the District of New Jersey, thereby barring defendant from access to material which would have enabled defendant to subject Visceglie to more searching cross-examination than was possible at trial; and (3) that the government misled the court as to the importance of the transcript of the New Jersey hearing to the conduct of defendant's defense here. It is argued that since Visceglie's testimony was critical to the jury's finding of the requisite intent to convict the defendant, the conviction must now be set aside. In the alternative, a hearing on the issues raised is requested.

The motion is supported by affidavit of counsel and exhibits, including the transcript of the New Jersey hearing and various letters from New York and federal authorities disclosing the time Visceglie became an informer and the nature of his cooperation. The government opposes the motion and in support of its position has filed affidavits of the Assistant United States Attorney who represented the government at defendant's trial, and of various prosecutorial personnel involved in the New Jersey hearing. Defendant's counsel has replied with a further affidavit. Both sides have filed memoranda of law.

While counsel has spent considerable time and effort on this matter and expansive discussion is required to dispose of the issues raised, the motion, in essence, is frivolous and is denied in all respects.

II

In the spring of 1976, Joseph Boriello brought back from Thailand to Salvadore Larca in New York, a codefendant of Madonna, a sample of heroin which, when tested, was found to be pure. Larca authorized Joseph Boriello to return to Bangkok to buy a kilogram of heroin. Boriello returned to New York in June, 1976, with the kilogram of heroin, and it was sold here for $100,000. A second trip was then organized. Larca supplied Boriello with four false bottom suitcases and a budget of $100,000 for the purchase of 10 kilograms of heroin, travel expenses for himself and two couriers. Boriello secured Jan Portman and Eugene Travers for the latter task. In July, 1976, he returned to Bangkok to purchase the heroin. When the couriers arrived, the heroin was packed in the false bottom suitcases. Boriello left Bangkok on August 16, 1976; the two couriers, carrying the heroin and travelling separately, left for New York the next day. Both were arrested in Honolulu and immediately agreed to cooperate. Most of the heroin Travers carried was replaced with a substitute. On August 19, 1976, he flew to New York with two government agents, with the substituted substance, along with approximately 32 grams of heroin, packed in two of the suitcases.

The same day, Madonna, under the name of Paul de Robertis, rented a red Ford Granada from Hertz at New York's LaGuardia airport. He drove the car from the airport to a parking lot near his home where he left it. On August 20, 1976, Boriello contacted Travers at the latter's apartment in the Bronx. After telling Travers to wait for further instructions, Boriello went to Larca's home where he met with Larca and Madonna. Larca took Boriello to the parking lot to pick up the red Ford Granada that Ma-

donna had rented and parked there the day before. Larca told Boriello to pick up the heroin and deliver it in the Hertz car at 5:00 p.m. to 58th Street and Fifth Avenue, across from F.A.O. Schwartz.

Boriello went to Travers' apartment and took possession of the suitcases that he believed were filled with heroin. While he was loading the suitcases into the trunk of the car, he was arrested. He immediately agreed to cooperate. Boriello then proceeded to the Manhattan rendezvous under government surveillance. He was met by Madonna and Larca. Boriello gave Madonna the keys to the Hertz car. Larca gave Boriello the keys to Larca's car and told Boriello to go home to wait for a call. Madonna entered the car on the driver's side and Larca on the passenger side, at which point both were arrested. Madonna advised the arresting officers that he was Paul De Robertis but subsequently used his real name.

Madonna's defense was lack of knowledge and intent; he claimed that he was innocently accompanying Larca and knew nothing about the heroin. Because of that defense, the government was permitted to adduce through the testimony of Nicholas Visceglie, then under sentence on a state conviction, that he had been involved in 1972 with Madonna and Larca in a deal to buy 10 kilograms of heroin for $200,000, but he and his partner could not raise the cash and the deal was called off.

III

Defendant contends that Visceglie lied about the nature and extent of his cooperation with law enforcement authorities, lied about the place of his arrest, the consideration he was to receive from the government for testifying,

and his relationship with Paul Levy in the case pending in the United States District Court in New Jersey.

Defendant has established on the first point that Visceglie had begun cooperating with local police as early as 1973. At the trial Gerald Alch, Madonna's counsel, on cross-examination asked Visceglie when he first became an informant. Visceglie responded in 1975. Prior to that question being put, Visceglie had been asked where in the Metropolitan Corrections Center, a federal facility here in New York, he was housed and if the third floor where he was staying was where informants were kept segregated from the general prison population. These questions leading up to those about his cooperation with law enforcement officials could certainly have led the witness to believe that the questions related to his cooperation with federal authorities Later, Alch said "I believe you testified that you had begun to cooperate with the Federal Government in approximately June or August 1975." Transcript ("Tr.") 1125. This clearly shows that Madonna's counsel intended by his questions to explore Visceglie's cooperation on the federal side and understood Visceglie's responses to relate to cooperation with federal officials. Since both Madonna's counsel and Visceglie understood the questions and answers related to the latter's federal activities, the record cannot now be twisted to suggest that the inquiry was meant to embrace cooperation with state or local law enforcement authorities as well.

Moreover, since it is clear that Alch understood Visceglie's responses to relate solely to his cooperation with federal law enforcement authorities, it was incumbent on Alch, if he wished to explore an additional area, to ask Visceglie specifically when his cooperation with state or local authorities began. Since that question was never put, the

assertion that Visceglie gave false testimony must be rejected. There was no deliberate deception by the presentation of known false evidence, and the rule that convictions so secured must be set aside, *see e.g., Giglio* v. *United States,* 405 U.S. 150, 153-54 (1972); *Mooney* v. *Holohan,* 294 U.S. 103, 113 (1935); *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959); *see also United States* v. *Sanzo,* slip op. 81-1330 (2d Cir. decided March 10, 1982), has no application to this case.

The other matters raised, even if the witness did lie, are irrelevant. However, Visceglie testified truthfully about his expectations of government assistance when he stated he did not believe that its help would result in his state sentence being reduced. The government did advise state authorities of Visceglie's cooperation, and it did not result in a modification of his sentence. Yet, even if the government's had effected a shortening of the state sentence, it is difficult to discern in what respects that would make Visceglie's testimony false. He did not misrepresent what the government had promised it would do. He testified that he was told that his cooperation would be brought to the attention of the sentencing judge and relevant authorities. When he testified, Visceglie could not have been expected to know as a fact the reaction of state authorities. He was expressing only a belief or opinion, and he was certainly entitled to state what he thought might happen.

The additional claim that Visceglie testified falsely concerning where he was arrested and about his relationship to Levy and that such false testimony provides the basis for a motion to set aside the convection is without merit. Even if Visceglie did lie about these matters, they were not material either to the merits of his testimony or his credibility as a witness.

We now turn to the claims concerning prejudice to defendant in not having access to the transcript of the closed hearing before Judge Meanor, who presided over the proceedings in New Jersey. Visceglie and Donald Varna along with a third codefendant were under indictment for conspiracy in the United States District Court for the District of New Jersey. Visceglie and Varna were both represented by Herbert Siegel. Visceglie was acting as a government informer at the time, but he did not tell Varna or Siegel that he was cooperating with the government.

From August, 1975 until February 1, 1976, Visceglie cooperated with federal Drug Enforcement Administration ("DEA") authorities, but apparently the federal prosecutors handling the trial preparations in the case was not initially aware of Visceglie's role. On learning of Visceglie's cooperation for the first time, the Assistant United States Attorney handling the case advised the court of the problem in February, 1976. On Judge Meanor's instructions all defendants were notified that Visceglie had been an informer since August, 1975.

In April 1976, Herbert Siegal advised Visceglie that he could no longer represent him and on May 20, 1976, moved to dismiss the indictment against Varna. Judge Meanor held as *in camera* evidentiary hearing on August 16, 1976, to determine whether Visceglie's role as secret informer and codefendant warranted dismissal of the indictment against Varna. On Judge Meanor's advice the government was represented by counsel who had no prior involvement in the case. The court instructed all witnesses and participants that the evidence at the hearing was not to be disclosed to anyone until after the conclusion of the case in a final judgment. After the hearing, the court ordered

the transcript sealed but refused to dismiss the indictment against Varna.

The government decided not to proceed against Visceglie and the trial proceeded against Levy and Varna on December 25, 1976. After two days of trial Levy pleaded guilty to a superseding indictment and the trial continued against Varna alone. He was found guilty, but on June 21, 1978, his conviction was reversed and the indictment ordered dismissed. *See United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978).

When Visceglie testified here at the defendant's trial, his dual role as an informer and a codefendant with both Varna and himself being represented by the same counsel was elicited on cross-examination. It was brought out that he did not tell Varna or Siegel that he was an informer, and testimony was elicited concerning the course the matter took when Visceglie's cooperation with the government became known. In short, all facets of this matter were fully explored on cross-examination both by counsel for defendant and counsel for Larca. Tr. 1127, 1129, 1151-1158.

Before Visceglie was called, Madonna's counsel advised the court that defendant's investigator has ascertained that the transcript of the hearing pertaining to testimony concerning Visceglie's dual role was under seal pursuant to Judge Meanor's order, and that the judge had refused to allow defendant to inspect the record of that proceeding. Tr. 758-6. The court agreed to speak to Judge Meanor to determine whether it would be appropriate to seek to secure the transcript of the hearing for defendants' use in examining Visceglie.[1] The court did explore the matter

[1] Counsel for Salvadore Larca as well as counsel for Madonna were requesting that the court secure the transcript for their use in the cross-examination of Visceglie.

with Judge Meanor in a telephone conversation and was satisfied that the transcript of the hearing before Judge Meanor was not relevant to any issues in the trial in the instant case, and counsel were so advised. Counsel expressed concern that Visceglie might deny having been in both Varna's camp and the government's at the same time. They stated that without having the New Jersey transcript, they would then be helpless to explore the matter further. The court assured them that if that did occur, it would reconsider its decision not to request Judge Meanor's permission to obtain the transcript. Tr. 867-870. Visceglie was called and after his cross-examination no further request of the court to secure the transcript was made by defense counsel. The court can only conclude that no further request was made because defense counsel were satisfied that the matter had been thoroughly explored.

Defense counsel was fully conversant with what had occurred in the New Jersey case. The reason articulated at trial for counsel's need of the transcript was to be able to confront Visceglie in the event he lied on the witness stand about his dual role. Visceglie, however, freely admitted to what he had done and even assented to the unflattering characterizations defense counsel ascribed to his role. The inquiry into Visceglie's activities, therefore, was not blocked as counsel feared, but was fully explored. Since the court could not have allowed counsel to turn defendant's trial into a mini-trial of a collateral issue, counsel could have done no more with physical possession of the transcript of the hearing than was actually accomplished without it. In any event, the outcome of the trial would not have been affected by counsel having the use of the transcript. Therefore, no *Brady* v. *Maryland, supra,* issue is involved; *see also United States* v. *Agurs,* 427 U.S. 97,

104-05 (1976); *United States* v. *Provenzano*, 615 F.2d 37, 47 (2d Cir.), *cert. denied*, 446 U.S. 953 (1980).

The New Jersey matter was, at best, collateral, and the transcript was of use to defendant only for impeachment purposes. It had no bearing on the merits of the charges against Madonna. But the transcript would have served no purpose even to impeach since Visceglie admitted to everything.

Moreover, there is no showing of any misconduct on the part of government counsel in this case. The Assistant United States Attorney who was government trial counsel in the case denies having a transcript of the hearing, and there is no evidence to the contrary. Nor is there evidence that he had any greater knowledge of what had transpired in the proceedings before Judge Meanor than defendant. Indeed, it seems clear enough from this record that defendant's counsel was more familiar with what had caused Judge Meanor to hold the closed hearing that was the Assistant United States Attorney.

Finally, and most importantly, Visceglie's testimony was not critical to defendant's conviction. There was more than sufficient evidence, other than Visceglie's, from which the jury could reasonably infer knowledge and intent beyond a reasonable doubt. Madonna had been under surveillance for a long time, and was under surveillance when he had been observed renting the red Ford Granada under the assumed name of Paul de Robertis. He had been kept under surveillance when he drove the rented car from the airport to the parking lot. There was testimony that Larca was defendant's chief lieutenant, and Madonna was present at Larca's home when Boriello arrived to receive instructions about where to deliver the heroin which all believed Travers had brought from Bangkok to New York. Boriello

was taken by Larca to the red Granada and instructed to load the drugs in the car and drive it to midtown Manhattan. Madonna and Larca were at the rendezvous waiting for Boriello. Madonna took the keys to the car from Boriello and when arrested identified himself as Paul de Robertis. That surely was sufficient evidence for the jury to conclude that Madonna was guilty as charged beyond a reasonable doubt. That the evidence was largely circumstantial does not diminish its probative value or intrinsic significance in leading to defendant's conviction. The government was not required to show Madonna physically handling the heroin to convince the jury of his knowledge and intent beyond a reasonable doubt. Visceglie's testimony was mere frosting which the government probably utilized in order to leave no available stone unturned to secure defendant's conviction.

Although in a letter to District Attorney Merola dated March 22, 1977, government counsel describes Visceglie's testimony as "critical in putting the lie to Madonna's well orchestrated defense and resulted in his conviction," undue significance cannot be given to that statement. The characterization of the testimony is from a government attorney, who did not participate in the trial of the case. The letter was in fulfillment of the government's promise to make Visceglie's cooperation known to state authorities. Under the circumstances, proper perspective requires that its generous evaluation of Visceglie's testimony be somewhat downgraded. And most significantly, the court presided over the trial and is in a far better position to gauge the importance of Visceglie's testimony to the outcome of the case than counsel who did not attend the trial, hear the testimony and see the reaction of the jury as the trial developed. There is no doubt in the court's mind that

without the prior similar act testimony, defendant would have been found guilty beyond a reasonable doubt.

The court agrees with the government that defendant's motion is actually one for a new trial based on newly discovered evidence. Under Rule 33, F.R.Cr.P., such a motion must be made within two years of final judgment. Defendant was sentenced on December 21, 1976. The appellate process on the merits was concluded on October 31, 1977, when certiorari was denied. However, defendant could not have had access to the transcript of the closed hearing until after the decision of the Third Circuit in *United States* v. *Levy, supra.* That decision was handed down initially on May 3, 1978, and was amended on June 21, 1978. Defendant admits access to the transcript "when the defendant Varna's conviction was reversed by the Third Circuit Court of Appeals" Def. Mem. at 7. That means it was in counsel's possession by June or July, 1978, at the latest. Accordingly, this motion could have and should have been filed at least by the summer of 1980.

By merely designating this a § 2255 motion, the time constraints applicable to a motion based on newly discovered evidence cannot be so readily circumvented. *Brach* v. *United States,* 542 F.2d 4, 8 (2d Cir. 1976). The delay of over three years in making this motion after the material became available is much too long, and the motion could be denied on that ground alone. However, even if the motion were accepted as timely, the newly discovered evidence must be such that it would probably lead to acquittal. *See United States* v. *Gilbert,* 668 F.2d 94 (2d Cir. 1981); *United States* v. *Alessi,* 638 F.2d 466, 479 (2d Cir. 1980). It is clear from what has been said heretofore that the evidence defendant relies on to support this motion cannot satisfy such heavy burden of proof requirements.

Accordingly, the motion to set aside the conviction is denied, and in view of the insubstantial nature of the case made for relief, the alternative of a hearing on the issue raised is also denied.

IT IS SO ORDERED.

Dated: New York, New York
April 12, 1982

/s/ ROBERT L. CARTER
Robert L. Carter
U.S.D.J.

APPENDIX C

Constitutional Provisions Involved

U.S. Constitution, Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Statutory Provisions Involved

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain

a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

• • • • •

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order

it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine

that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

* * * * *

N.Y.P.L. § 70.00 Sentence of imprisonment for felony.

1. Indeterminate sentence. Except as provided in subdivision four, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment;

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence.

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years.

(ii) For a class A-II felony, such minimum period shall not be less than three years nor more than eight years four months.

(b) Where the sentence is for a class B or class C violent felony offense as defined in subdivision one of section 70.02, the minimum period shall be fixed by the court pursuant to subdivision four of section 70.02. Where the sentence is for any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

4. Alternative definite sentence for classes D, E and certain class C felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D

or class E felony, or to a class C felony specified in article two hundred twenty, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

* * * * *

Rules Governing Proceedings in United States District Courts Under 28 U.S.C. § 2255

Rule 9. Delayed or Successive Motions.

(a) Delayed Motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.